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In the Supreme Court of the United States

OCTOBER TERM, 1991

HOWARD H. GILBERT, JR., ET AL.,
PETITIONERS,

v.

CITY OF CAMBRIDGE AND
CAMBRIDGE RENT CONTROL BOARD,
RESPONDENTS.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Questions Presented

1. Are property owners barred from bringing a federal declaratory judgment action challenging a local ordinance on its face as a taking without just compensation, where they have failed first to seek just compensation for the alleged taking in the Massachusetts state courts under that state's inverse condemnation statute, Mass. Gen L. ch. 79, §10?

2. Are property owners barred from bringing a federal declaratory judgment action challenging a local ordinance on its face as a taking without just compensation, where the ordinance merely establishes a permit system to regulate their property?

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

STATEMENT OF THE CASE

Proceedings Below

This lawsuit was filed in 1988 in federal district court by petitioners, the owners of several rent-controlled apartment buildings in Cambridge, Massachusetts. Petitioners assert that they wish to convert their rent-controlled buildings into condominiums or cooperatives and sell individual units. Complaint, Paragraphs 12, 15; Petition, p. 4. The City of Cambridge's Removal Permit Ordinance (the "Ordinance"), enacted in 1979, precludes their doing so without first obtaining permits from the Cambridge Rent Control Board. The Ordinance, they allege, on its face and as applied, thus takes their property without just compensation and violates their due process rights.[1] Asserting claims under 42 U.S.C. §1983, they seek declaratory relief only. Complaint, Prayers 1, 2.

Certain of the petitioners (the "Southview" group) sought removal permits from the Board to convert their units to condominiums or cooperatives in 1980. Their applications were denied, and they did not appeal. The remaining petitioners (the "Blevins" group) have never sought permits.

[1] The complaint also asserted an equal protection claim that was dismissed by the district court. The court of appeals affirmed and petitioners do not further press the matter.

Petitioners also asserted a state law claim: that the Board had failed to perform a study, mandated by the Ordinance itself, to determine whether the total number of rental units in the city, excluding public housing units, exceeded the number as of January 1, 1970; under a "sunset" provision, the Ordinance would go out of effect should that condition be satisfied. This claim was dismissed by the district court for lack of pendent jurisdiction when the federal claims were dismissed. The court of appeals affirmed; this matter also is not further pressed.

None of the petitioners have ever filed an inverse condemnation action in Massachusetts state court to seek compensation for the alleged taking of their property. *See* Mass. Gen. L. ch. 79, §10.

The City and the Board filed a motion to dismiss, urging, without arguing the merits, that:

> (1) The lawsuit should be dismissed as unripe under *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), for petitioners' failure to utilize the available Massachusetts inverse condemnation remedy;
> (2) even if the action were technically ripe despite the petitioners' failure to utilize the inverse condemnation remedy, the court should exercise its discretion to decline to entertain this declaratory judgment action, since it could not fashion a complete remedy;
> (3) the facial claims, that the "mere enactment" of the Ordinance had taken petitioners' property without just compensation, were barred by the applicable three-year statute of limitations, since the Ordinance had been enacted nine years before the suit was filed;
> (4) the facial claims were barred in any event because the mere establishment of a permit system could not be found to take petitioners' property (or violate their due process rights);
> (5) the Southview group's as-applied claims were barred by the statute of limitations, since the permit denials to which the as-applied claims necessarily related had taken place eight years before the suit was filed;
> (6) the Blevins group's as-applied claims were not ripe since they had never sought permits; and
> (7) in any event, the court should abstain under the doctrine of *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943).

The district court granted the motion in its entirety and dismissed the action. In a comprehensive memorandum, Judge Woodlock held that:

> (1) The statute of limitations barred the facial claims;
> (2) the statute of limitations barred the Southview as-applied claims;
> (3) the Blevins as-applied claims were not ripe;
> (4) alternatively, as a matter of discretion, the court would decline to entertain a declaratory judgment action on the takings claims because, even were it to find a taking, petitioners' failure to utilize the Massachusetts inverse condemnation remedy meant that the court could not find the taking to be without just compensation, and hence could not fully determine the controversy between the parties; and
> (5) the due process claims should be dismissed on the merits.

Gilbert v. *City of Cambridge*, 745 F. Supp. 42 (D. Mass. 1990) (Petition, p. A-30). So ruling, the district court did not reach the City's and the Board's other grounds for urging dismissal.

The court of appeals affirmed. In an equally comprehensive opinion, Judge Selya held that:

> (1) The facial takings claims were not ripe, in view of the existence of a permit process that contemplated the grant as well as the denial of permit applications;
> (2) the Southview as-applied takings claims were barred by the statute of limitations;
> (3) the Blevins as-applied takings claims were not ripe;
> (4) alternatively, the takings claims were barred as unripe by petitioners' failure to seek just compensation under the Massachusetts inverse condemnation statute; and

(5) the due process claims should be dismissed on the merits, and in addition were not ripe.

Gilbert v. *City of Cambridge*, 932 F.2d 51 (1st Cir. 1991) (p. A-1). In so deciding, the court of appeals referred to the district court's dismissal of the facial claims on statute of limitations grounds as "problematic," but did not itself analyze or decide the point.[2] *Id.* at 57, n.8 (p. A-19). Nor did that court reach respondents' *Burford* abstention argument, or the district court's decision to decline to entertain the declaratory judgment action as a matter of judicial discretion. *Id.* at 67, n.21 (p. A-29). Thus, none of these grounds for dismissal are before this Court.

Cambridge's Regulation of Condominium and Cooperative Conversion

Although minor modifications have been made over the years, Cambridge has had its system of residential rent control in effect continuously since 1970.

In the late 1970's, large numbers of rental units began to be converted to cooperatives and condominiums. Although this trend was not confined to rent controlled housing, the Cambridge City Council in 1979 found that condominium conversion (and other causes) had led to the loss of more than ten percent of the controlled rental units in the city, and hence that regulation of the process was necessary to deal with the public emergency of a shortage of affordable housing units for low and moderate income families and the elderly. Ordinance, §1(a)[3] (p. A-59). *See Flynn* v. *City of Cambridge*, 383 Mass. 152, 156-157, 418 N.E.2d 335, 337 (1981).

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[2] The Ninth Circuit has considered the matter. In *DeAnza Properties X, Ltd.* v. *County of Santa Cruz*, 936 F.2d 1084 (9th Cir. 1991), that court held, as had the district court herein, that a facial takings challenge to a rent control ordinance was time barred, on the ground that the statute of limitations ran from the enactment of the ordinance.

[3] The Ordinance currently in effect, Ordinance 966, as amended, is codified as Chapter 8.44 of the City of Cambridge Code.

The Removal Permit Ordinance was enacted in response. Under the Ordinance, a unit already in the rent control system could not be removed from that system without a permit from the Board. Removal was defined to include occupancy of a condominium unit by its owner, demolition, or rehabilitation that would prevent occupancy (except as such rehabilitation was required by law).[4] Ordinance, §1(b)(4) (pp. A-60, 61). The Ordinance set forth standards to guide the Board in determining whether to issue removal permits. Ordinance, §1(d) (pp. A-62, 63). Building owners, however, continued to be entitled to evict tenants from noncondominium units, without obtaining permits, if they or members of their families wished to reside in the units themselves. Ordinance, §1(b)(4) (p. A-61). *See* Rent Control Enabling Act, 1976 Mass. Acts ch. 36, §9(a)(8).

As originally enacted, the Ordinance did *not* prohibit the sale of individual units as cooperatives or condominiums without removal permits; permits were required under Section 1(b)(4)(i) only for unit owners subsequently to occupy their units. It soon became apparent, however, that this regulatory system was not satisfactory. Consequently, in 1981 the Ordinance was amended to provide that, although an owner could sell his entire interest in a building without a permit, individual units could not be sold as condominiums or cooperatives unless the building owner first obtained a removal permit for the sale, whether or not the unit subsequently was to be occupied by its new owner.[5] Ordinance, §1(c ½) (p. A-62).

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[4] Conversion to a cooperative was added to the definition in 1980, improperly causing a unit to be held vacant in 1984. Ordinance, §1(b)(4)(iv), (v) (pp. A-60, 61).

[5] In *Steinbergh* v. *Cambridge Rent Control Board*, 406 Mass. 147, 546 N.E.2d 169 (1989), the Massachusetts Supreme Judicial Court struck down this amendment on the ground that Cambridge lacked the power under state law to enact it. On June 6, 1990, by Chapter 52 of the Acts of 1990, the Massachusetts legislature explicitly granted Cambridge the necessary power. (The *Steinbergh* decision and the enactment of Chapter 52 both took place after this lawsuit was filed but before the district court granted the motion to dismiss.)

Petitioners' Prior Litigation

In January, 1980 (before the Ordinance's amendment to regulate the sale of units) the Southview group, which owned a rent-controlled building which it wished to convert to condominiums, applied to the Board for the removal permits necessary to permit prospective purchasers to occupy the units. The Board, after a hearing, denied the permits, thus effectively preventing the conversion.

Instead of appealing, the Southview group sought to circumvent the Ordinance. They reorganized their building as a cooperative, took the position that the rent control law and Ordinance did not apply to cooperatives, and began to market individual units. When the Board concluded that the Ordinance continued to apply, Southview brought a state court action seeking a declaration to the contrary. (They neither challenged the Ordinance on constitutional grounds nor appealed the prior denial of removal permits.) The Massachusetts Appeals Court upheld the Board's jurisdiction over cooperatives. *Southview Coop. Housing Corp.* v. *Rent Control Bd. of Cambridge*, 16 Mass. App. Ct. 1102 (1983) (summary disposition).

During the pendency of that litigation, the Southview group filed a second permit application with the Board. This application too was denied, after a hearing and findings of fact by a Board hearing examiner who analyzed the application with respect to the specific factors laid out in the Ordinance. Southview chose not to pursue judicial review of these permit denials, which occurred in 1980, either.

The Blevins petitioners never sought removal permits to convert any of the four buildings they owned to condominiums or cooperatives.

Reasons for Denying the Writ

Because the lower courts were presented with, and ruled upon, so many preliminary challenges to petitioners' lawsuit, petitioners face a daunting task in trying to construct a relatively straightforward Petition. To do so, they abandon their

as-applied claims and seek to resurrect only their facial claims. They challenge, as they must, the two grounds upon which the court of appeals based its rejection of those claims: its application of *Williamson County* to hold that petitioners' failure to utilize the Massachusetts inverse condemnation remedy bars them from proceeding, and its holding that the existence of a permit system precludes their facial challenge. (In their efforts to advance their cause, petitioners wrongly describe this latter holding as being on the merits, and thus urge this Court itself to reach the merits.)

In order to obtain meaningful relief, petitioners must persuade this Court that *both* issues are worthy of review. This Opposition will establish that, to the contrary, neither is. Moreover, since petitioners urge the Court at length to reach the merits, this Opposition also will establish that the merits are not properly before the Court, both because, contrary to petitioners' argument, the lower court did not reach them, and because in any event a multitude of preliminary rulings, not all open to review by this Court, stand in the way.

The Opposition begins by addressing the *Williamson County* issues.

I. The Issues Raised By Petitioners Concerning The Application Of *Williamson County Regional Planning Commission* Do Not Merit This Court's Attention.

Seeking to persuade this Court to breathe new life into their lawsuit, petitioners urge, as they must, that the Court grant review to determine whether the court of appeals was correct in holding that *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172 (1985), bars their action.

Williamson County precludes a Section 1983 takings action in federal court if there is an available state inverse condemnation procedure that the plaintiff has failed to utilize. Specifically, petitioners seek to have this Court determine whether the court of appeals was correct in holding that *Williamson County:*

(1) bars petitioners' action despite their claim that Massachusetts state courts "have never allowed the recovery of damages for legislation that takes property"; and

(2) applies to declaratory judgment actions as well as actions for damages.

(Petition, p. iv.) This Court should deny petitioners' request.

A. *The Holding Requiring Prior Resort To The Massachusetts Inverse Condemnation Procedure Was Only An Alternative Ground For The Decision Below.*

First of all, as the Statement of the Case demonstrates, both in the district court and in the court of appeals the *Williamson County* holding was nothing more than an alternative ground for dismissing petitioners' facial takings claims. In the court of appeals, there were two dispositive grounds: the fact that the availability of a permit process made the claims unripe, and *Williamson County*.

Part II of this Opposition demonstrates why the former holding, which petitioners wrongly characterize as a decision on the merits, is not worthy of this Court's review. Because it is only an alternative holding, the *Williamson County* point by itself cannot be dispositive of anything, and hence this Court should not grant review solely in order to consider it.

B. *In Any Event, This Court Should Not Reopen The Question Of Whether Massachusetts Offers A Procedure For Obtaining Just Compensation Sufficient To Satisfy* Williamson County.

Petitioners argued in the district court that *Williamson County* could not bar their action because Massachusetts did not provide an inverse condemnation remedy for property owners such as themselves. The district court extensively analyzed Massachusetts law and concluded, to the contrary, that

Mass. Gen. L. ch. 79, §10 provided such a remedy.[6] *Gilbert*, 745 F. Supp. at 52 (p. A-49).

In so concluding, the court rejected petitioners' argument that a clause in the Massachusetts statute, which made the statute inapplicable if the taking were "effected by or in accordance with a formal vote or order of . . . a body politic," covered the enactment of an ordinance by a city council. Rather, the court held, the proviso was intended only to preclude use of the statutory procedure if a formal direct eminent domain proceeding for the taking of the property had been initiated. *Id.*

This plausible statutory interpretation was reviewed by the court of appeals, which summarized the arguments on both sides, expressly found that the cases upon which petitioners had placed "paramount reliance" were not applicable, *Gilbert*, 932 F.2d at 65, n.18 (p. A-25), and concluded that "we believe that the district court's construction of Chapter 79 is correct." *Id.* at 65 (pp. A-24, 25).

The court of appeals then went on to hold that it did not need to "probe the point," because, to the extent that the availability of the remedy was unclear, petitioners had failed to carry their burden to demonstrate that no remedy was available. *Id.* (pp. A-25, 26).

This Court should permit matters there to rest; neither the issue of construction of this Massachusetts statute, nor the burden of proof issue, is of sufficient importance to merit the Court's further attention.

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[6] Massachusetts General Laws Chapter 79, §10 provides in relevant part:

> When the real estate of any person has been taken for the public use . . . or has been entered for a public purpose, but such taking [or] entry . . . was not effected by or in accordance with a formal vote or order of the board of officers of a body politic or corporate duly authorized by law . . ., and by such taking . . ., entry . . . or use he has suffered an injury for which he is entitled to compensation, the damages therefor may be recovered under this chapter.

1. *This Court Should Defer to the Lower Courts' Finding that Massachusetts Offers A Remedy.*

This Court has long deferred to lower federal court determinations of state law. *See, e.g., Pembaur* v. *City of Cincinnati*, 475 U.S. 469, 484 n.13 (1986) (Court accords "great deference to the interpretation and application of state law by the courts of appeals"); *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) (declining to undertake independent review of lower court's determination of state law). One reason for this deference is that "[t]he federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Butner* v. *United States*, 440 U.S. 48, 58 (1979). Accord, *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985) ("district courts and courts of appeals are better schooled in and more able to interpret" local law); *Bishop* v. *Wood*, 426 U.S. 341, 345-346 (1976). But this Court has also noted a second reason for its deference: the policy will "render unnecessary review of [the lower courts'] decisions in this respect," *Brockett*, 472 U.S. at 500, quoting *Cort* v. *Ash*, 422 U.S. 66, 73 n.6 (1975), and thus reduce the volume of Court review of such decisions.

Both reasons militate against further review of the state law issue here. The district court and the court of appeals alike deal regularly with Massachusetts law issues. Both courts considered the statutory interpretation question herein at length; had either court thought it necessary, it could have certified the question for decision to the Supreme Judicial Court of Massachusetts. Neither court did so. In these circumstances, this Court should not devote its scarce time and resources to second-guessing the unanimous conclusion of the lower courts on this narrow state law issue.[7]

[7] Nothing in *Salve Regina College* v. *Russell*, 111 S.Ct. 1217 (1991), suggests a different result. In that case, this Court held that courts of appeals were to undertake *de novo* reviews of district court determinations of state

2. *The issue of whether a particular Massachusetts statute provides a remedy is not of sufficient importance to merit this Court's attention.*

Even aside from the fact that the issue of state law has already been decided by two lower courts, it is not worthy of this Court's attention.

Petitioners do not suggest, and there is no reason to think, that other states' inverse condemnation statutes share the Massachusetts statute's convoluted phraseology. Thus, a decision as to the availability or scope of a remedy under the Massachusetts statute will have no impact whatever outside Massachusetts.

Moreover, even were this Court to decide that issue, its decision would not be definitive. Regardless of this Court's ruling, the issue of whether Section 10 of Chapter 79 provides a remedy to property owners such as petitioners will not be finally and definitively resolved until the Supreme Judicial Court of Massachusetts rules. This Court's decision could do no more than add a third layer of federal court prediction of state law on top of the two already-existing layers.

In considering whether to grant review now, it is also relevant that no great hardship or injustice can result, to petitioners or anyone else, if the lower federal courts here have erred in their reading of Massachusetts law. Under the court of appeals' decision, a property owner who wishes to challenge Cambridge's Removal Permit Ordinance need only file an inverse condemnation action in Massachusetts court. If state courts in that proceeding determined that Mass. Gen. L. ch. 79, §10 in fact did not provide a remedy, the state proceeding would be truncated, but the litigant involved would be able to

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law. (The First Circuit did exactly that in this case.) In *Salve Regina*, the Court explicitly distinguished the question of court of appeals review of state law issues from the question of its own review of such issues, however, noting that "the manner in which this Court chooses to expend its limited resources in the exercise of its discretionary jurisdiction" was an entirely separate matter from the question before it. *Id.* at 1223 n.3.

return to federal court to press his claim, and all future litigants would know that prior resort to state court was unnecessary in Massachusetts.

3. *The issue of who bears the burden of proof as to the availability of a remedy does not require review.*

Although the bulk of their argument to this Court is to the effect that Massachusetts offers no inverse condemnation remedy, petitioners ultimately suggest that this Court should take this case, not to decide that point, but in order to decide whether it is proper to apply *Williamson County* if the availability of the state remedy is unclear. (Petition, p. 30.)

This issue is equally unworthy of this Court's attention. First of all, a fair reading of the court of appeals' opinion, *see Gilbert*, 932 F.2d at 64-65 (pp. A-24 to 26), makes absolutely clear that the court's conclusion with respect to burden of proof was simply a secondary, alternative ground for its decision. As pointed out above, the court of appeals first summarized the arguments on both sides, analyzed and discredited the pair of cases upon which petitioners placed "paramount reliance,"[8] *id.* at 65, n.18 (p. A-25), and then held that "[w]e believe that the district court's construction of Chapter 79 is correct." *Id.* at 65 (p. A-25). Only after so doing did it go on to its consideration of the burden of proof. Hence, that discussion was not essential to its decision, and the current dispute concerning the burden of proof is no more than academic.

Moreover, the court of appeals' decision concerning the burden of proof is completely consistent with this Court's established doctrine. *See Hudson* v. *Palmer*, 468 U.S. 517, 539 (1984) (O'Connor, J., concurring) (to prevail on takings claim "claimant must either avail himself of the [state] remedies . . . or prove that the available remedies are inadequate").

[8] The court concluded that "[w]e do not believe either that these opinions stand for [petitioners'] proposition or that they can carry the cargo which [petitioners] load on them." *Gilbert*, 932 F.2d at 65, n.18 (p. A-25).

Finally, the decision herein is in accord with decisions of the two other courts of appeals that have addressed the matter. *See Austin* v. *City of Honolulu*, 840 F.2d 678, 680 (9th Cir.), *cert. denied*, 488 U.S. 852 (1988); *Littlefield* v. *City of Afton*, 785 F.2d 596, 609 (8th Cir. 1986) (where there may be remedy, federal action not ripe until state courts rule remedy not available).

In sum, there is no reason for this Court to concern itself with the matter.

C. *The Court of Appeals' Application of* Williamson County *to a Declaratory Judgment Action Raises No Significant New Issue.*

Nor does the issue of the application of *Williamson County* to declaratory judgment actions merit this Court's attention.

1. *The court of appeals decision is both correct and consistent with* Williamson County.

In *Williamson County*, this Court based its holding, that a Section 1983 takings claim in federal court is unripe if there is an available state inverse condemnation remedy that was not pursued, on the unique nature of the Takings Clause. Unlike other constitutional provisions, that Clause does not forbid government action, but merely imposes a condition: property may be taken (for a valid public purpose) so long as just compensation is provided. Since there is no requirement of advance compensation, "no constitutional violation occurs until just compensation has been denied." *Williamson County*, 473 U.S. at 194 n.13.

Nothing in *Williamson County* suggests that it applies only if the relief sought in the federal court action is damages, and not a declaration. *Williamson County* based its conclusion that there was no jurisdictional basis for a Section 1983 damages award on the fact that there is no violation of the Constitution until compensation is denied. But if this is so, there equally is no jurisdictional basis for a Section 1983 declaration of unconstitutionality. Thus, petitioners' argument that

the Court should take this case to decide that issue should be rejected.

Petitioners cannot and do not suggest that the court of appeals decision herein barring declaratory relief conflicts with any other court of appeals decision on the point. It does not. In fact, the few other court of appeals cases in which the issue has arisen all reached the same conclusion as the First Circuit herein; until this decision, no other court even found the point worthy of discussion. *See, e.g., Executive 100, Inc.* v. *Martin County*, 922 F.2d 1536, 1542 (11th Cir. 1991), *pet. for cert. pending on other grounds*, No. 90-1707, 59 U.S.L.W. 3840 (filed May 6, 1991); *East-Bibb Twiggs Neighborhood Ass'n* v. *Macon Bibb Planning & Zoning Comm'n*, 896 F.2d 1264, 1266 (11th Cir. 1989); *Littlefield*, 785 F.2d at 609. Thus, there simply is no need for this Court to take up the matter.

There is good reason why the lower courts have not distinguished between declaratory and damage remedies for purposes of applying *Williamson County*. Virtually every potential Section 1983 takings lawsuit, including this one, can properly include both a claim for declaratory (or injunctive) relief and a claim for damages, and almost all do so.[9] Thus, a rule that would provide for federal court jurisdiction over one claim but not the other would be both artificial and highly inefficient. *Williamson County* itself well illustrates the matter. That case began as a proceeding seeking both types of relief; it was transformed into a suit solely for damages by the time it reached this Court only by the happenstance that in the interim the parties had reached a settlement permitting plaintiffs to develop their property. *See Williamson County*, 473 U.S. at 183 n.7.

In this circumstance, a rule such as petitioners urge, making federal jurisdiction dependent upon the relief sought by the

[9] This is particularly true since *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304 (1987), held that damages could be recovered even for temporary takings.

This is *not* an action where petitioners filed suit before a newly-enacted ordinance took effect, and hence before any claim for damages yet existed.

plaintiff, not only would be inefficient, by encouraging the splitting of claims, but also would permit plaintiffs an easy end run around the holding of *Williamson County*. Plaintiffs could first seek declarations in federal court and then, if they prevailed, pursue damages in state court.

This problem of tactical claim splitting and avoidance of *Williamson County* is *not* just a theoretical one. The district court squarely recognized the problem in the context of this very litigation. In introducing its discussion of the case, the court pointed out that petitioners "do not seek damages — at least at this time in this court." *Gilbert*, 745 F.Supp. at 43 (p. A-30). Moreover, the Petition herein itself further highlights the point by asking, "is a prior suit for damages in state court necessary where the only relief sought *in federal court* is a declaratory judgment?" (Petition, p. 23) (Emphasis added). Thus, this Court should refrain from taking this case and upsetting the established rule that *Williamson County* applies equally to damage and declaratory judgment actions.

2. *In any event, the court of appeals did not review the district court's exercise of discretion to decline to grant a declaration, and hence that issue is not even before the Court.*

There is a further reason why this Court should not take up the question whether *Williamson County* bars petitioners' declaratory judgment action. Even were this Court to do so and hold that the court of appeals erred in applying *Williamson County* directly to an action for a declaration, that holding still would not remove the procedural obstacles that petitioners face in pursuing this litigation, or permit this Court to reach the merits of their constitutional claims. This is so because the court of appeals never reviewed the district court's decision to decline jurisdiction on discretionary grounds.

As pointed out above, the district court did not base its dismissal on a holding that *Williamson County* directly barred the suit for a declaration. Rather, the court assumed that a

claim for a declaration technically was ripe, notwithstanding *Williamson County*, and hence that the court had jurisdiction. It then went on to analyze the specific posture of this case, and exercised its discretion to decline jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §2201, on the ground that the unavailability of a damages remedy under *Williamson County* would prevent the court from granting a complete remedy that would fully resolve the controversy between the parties. *Gilbert*, 745 F. Supp. at 53-56 (pp. A-51 to 56). *Cf. Brillhart* v. *Excess Ins. Co.*, 316 U.S. 491, 495 (1942) (issue is "whether the questions in controversy between the parties . . . can better be settled in the proceeding pending in the state court").

The district court recognized that, even were it to assume jurisdiction and declare that the Removal Permit Ordinance effectuated a taking, that would not end the dispute between the parties. Takings are lawful, and the declaration would not mean that the Ordinance was unconstitutional or could not be enforced. Hence, even if they prevailed in federal court petitioners would be required to file a fresh action in state court to seek their only true remedy in this situation, compensation for the lawful taking.

The district court was clearly correct in its analysis. In *some* contexts, a federal court declaration that a taking had occurred *might* as a practical matter end a dispute, since the municipality involved *might* choose to rescind the offending ordinance rather than be exposed to open-ended claims for future compensation. But such speculation about the opposing party's potential response to a declaration is an insufficient basis for a federal court to assume jurisdiction.

Moreover, in the unique circumstances of *this* case, it is extremely unlikely that an abstract declaration that a taking had occurred would lead to repeal of the Ordinance, and thus end the controversy. The Rent Control Enabling Act, under which petitioners' property is regulated by Cambridge, expressly provides that property owners are entitled to a "fair net operating

income" in the form of rent from their tenants. *See* 1976 Mass. Acts, ch. 36, §7(a). This rent might well be all the "just compensation" required even were the Ordinance a taking. *See, e.g., Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934); *Hall* v. *City of Santa Barbara*, 833 F.2d 1270, 1281 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988); *Troy Ltd.* v. *Renna*, 727 F.2d 287, 300 (3d Cir. 1984). Thus, even a declaration that a taking had occurred would not give the parties to *this* litigation meaningful guidance, or offer the prospect of terminating the dispute between them, without further state court litigation on the compensation issue.

These considerations suggest the wisdom of the court of appeals decision applying *Williamson County* to actions for declarations. They also illustrate the limited utility of any review of that decision by this Court. Since the court of appeals did not review the district court's exercise of discretion to deny declaratory relief, *see Gilbert*, 932 F.2d at 67, n.21 (p. A-29), even a decision by this Court that *Williamson County* was not an absolute bar to petitioners' declaratory judgment action would not resolve the issue completely. It still would be necessary to return this case to the court of appeals for consideration of the district court's exercise of discretion.

II. In The Current Posture Of This Case, This Court Should Not Reach Out To Decide On The Merits Whether The Cambridge Ordinance Is Constitutional On Its Face.

When it affirmed the district court's decision, the court of appeals was not ruling on the merits. Its concluding summary makes this clear:

> The primary thrust of our holding today is that appellants' takings claims are not timely. . . . [A]ppellants' takings claims, being unripe . . ., were properly dismissed.
>
> . . .

> We need go no further. . . . [Appellants] cannot now expect a federal court to nurture their claims through a trial or to be tempted by unripe fruit into a premature consideration of potentially important constitutional issues — issues which may or may not actually materialize.

Gilbert, 932 F.2d at 66-67 (pp. A-28 to 29).

A. *The Court Of Appeals Decided Nothing More Than That Petitioners' Facial Takings Challenge Was Not Ripe Because The Ordinance Provided For Permits.*

Notwithstanding the lower court's description of its own decision, petitioners suggest that "the First Circuit decided the merits and held the Ordinance constitutional on its face." Petition, p. 5. On that basis, they urge this Court itself to take up the issue.

In fact, although the court of appeals' language is overbroad in places, what that court did was considerably less sweeping than petitioners suggest. The court held only that petitioners could not proceed with their facial takings claims because they had not established the existence of an "actual controversy," as is required both by Article III, Section 2 of the Constitution and by the Declaratory Judgment Act, 28 U.S.C. §2201. *Gilbert*, 932 F.2d at 55-56 (p. A-7). Citing *Steffel* v. *Thompson*, 415 U.S. 452, 458 (1974), the First Circuit reasoned that, because the Ordinance established a permit system, petitioners' failure to avail themselves of this mechanism prior to bringing suit rendered the matter non-justiciable. *Gilbert*, 932 F.2d at 55-57 (pp. A-8, 9).

This conclusion, of course, is entirely consistent with this Court's prior precedent, and with other court of appeals cases, both of which the First Circuit cited and explicitly followed. *See, e.g., United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985); *Southern Pacific Transp. Co* v. *City of*

Los Angeles, 922 F.2d 498, 506 n.9 (9th Cir. 1990).[10] There is absolutely no need for this Court to review such settled doctrine.

But even were the court of appeals wrong in its conclusion, it would not follow that it is open to this Court now to rule that the Ordinance is facially unconstitutional. Far from it. The issue of the constitutionality of the Ordinance has never been fully briefed and considered by a lower court in this case. Thus, even were this Court to conclude that the court of appeals erred, at most it would mean only that, assuming all the other procedural obstacles to this litigation also were removed, a *lower* court upon remand could reach the merits.

B. *Even If The Court Of Appeals Erred On This Ripeness Point, There Were Three Other Procedural Grounds On Which The Lower Courts Held That The Takings Claims Must Be Dismissed, And Two Of Them Are Not Even Presented To This Court For Review.*

The court of appeals emphasized its disinclination to reach the merits by pointing out that, having "waited nearly a decade after the Ordinance was enacted" before bringing this lawsuit, petitioners "were then too hasty, essaying a rush to judgment without due recourse to either the permit process or the State's inverse condemnation procedure." *Gilbert*, 932

[10] In *Southern Pacific*, the Ninth Circuit put the matter well. It explained that

> the [Supreme] Court has noted that certain facial challenges are impossible to evaluate absent some factual information regarding how the statute will be applied. This could lead to a ruling on the merits that, facially, the statute's "mere enactment" does not effect a taking . . . , or to a jurisdictional determination that the issue is not ripe for resolution. . . . The point appears to be that some regulations, by their very nature, are just not subject to facial attack on takings grounds. Prior to their application, in other words, the attacks are simply premature.

Southern Pacific, 922 F.2d at 506, n.9 (citations omitted).

F.2d at 67 (p. A-29). The Petition asking this Court to reach the merits betrays the same haste and disregard of proper procedure.

The following holdings of the lower courts *all* stand in the way of a court reaching the merits of the facial takings claims herein:

(1) the district court's holding that the statute of limitations bars the facial takings claims;
(2) the court of appeals' holding that *Williamson County* bars the takings claims;
(3) the district court's discretionary decision to decline jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §2201; and
(4) the court of appeals' decision that the facial takings claims are not ripe due to the existence of the permit system.

In addition, the City and the Board have suggested *Burford* abstention; the lower courts thus far have found it unnecessary to reach that issue.[11]

Even were this Court to take this case, it could have before it only two of the above matters: the court of appeals' holdings that *Williamson County* bars this action, and that the existence of a permit system makes the facial takings claims unripe. Since the court of appeals did not reach the other points, they are not open for review by this Court. Thus, despite petitoners' suggestion to the contrary, this Court will be unable to render any ruling on the merits of petitioners' constitutional challenge regardless of its disposition of the procedural issues presented in this case.

[11] Moreover, a federal court might wish to defer reaching the constitutional issues even were these procedural problems not present, in view of petitioners' assertion in Count 3 of their complaint that under state law the Board was required to determine whether the Ordinance was no longer in effect by virtue of a "sunset" provision which would be triggered by an increase in the number of rental units beyond the 1970 level. *See* Ordinance, §1(e)(2) (pp. A-65, 66). Such a determination of course would moot petitioners' federal claims.

C. *Even If These Procedural Obstacles Do Not Prevent Review At This Time, The Court Should Avoid Reaching The Constitutional Issues On The Current Record.*

Even if, despite this case's procedural problems, this Court still could somehow reach and decide the merits, it should not do so.

1. *The court of appeals was correct in counseling restraint.*

The court of appeals was hardly enunciating a novel doctrine in suggesting that it should avoid being "tempted" into "premature consideration of potentially important constitutional issues." *Gilbert*, 932 F.2d at 67 (p. A-29). The wisdom of restraint in constitutional adjudication has long been a guiding principle of this Court. Moreover, restraint is particularly appropriate in a case such as this, where petitioners seek a sweeping ruling concerning the facial constitutionality of a complex regulatory system that has been in effect for more than a decade.

In *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), this Court recently underscored the need for restraint in the very same rent control context present here. Asked to declare a rent control ordinance facially unconstitutional as a taking by virtue of a provision which permitted the consideration of "tenant hardship" in establishing rent, this Court refused, explaining that

> We think it would be premature to consider this contention on the present record. . . . Given the "essentially ad hoc, factual inquir[y]" involved in the takings analysis, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979), we have found it particularly important in taking cases to adhere to our admonition that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." *Hodel* v.

> *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-295 (1981).
>
> . . . [T]he mere fact that a hearing officer is enjoined to consider hardship to the tenant . . . , without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here.

Pennell, 485 U.S. at 10. *Pennell*'s reasoning should be followed.

In *Fresh Pond Shopping Center, Inc.* v. *Callahan*, 464 U.S. 875 (1983), *dismissing appeal from Fresh Pond Shopping Center, Inc.* v. *Rent Control Bd. of Cambridge*, 388 Mass. 1051, 446 N.E.2d 1060, a property owner sought a removal permit to demolish a specific building, and the permit was denied. The case thus presented a concrete controversy: a specific provision of the Ordinance, its regulation of demolition, Ordinance, §1(b)(4)(ii) (p. A-60), was at issue, and to the extent that its constitutionality might turn on specific facts, those facts had been established through the permit application process. Even so, this Court dismissed the appeal.

If that case did not present a substantial federal question, this case is even less suitable for Court review. To be sure, the Southview group sought removal permits for conversion in 1980. But they did not appeal the denial of their application, which therefore is not before this Court, and in any event, as the court of appeals pointed out, petitioners have acknowledged that "the economic situation . . . changed" between their 1980 applications and the filing of this lawsuit in 1988. The Blevins group has never sought permits. *Gilbert*, 932 F.2d at 62 (p. A-20). Thus, there is no curent factual record on which to rely in judging the constitutionality of the Ordinance.

2. *This case does not involve a permanent physical occupation, but only a restriction on sales which must be analyzed as a regulatory taking.*

Rather than recognizing the inappropriateness of a facial challenge, petitioners urge that one is possible. To do so, they argue in sweeping and simplistic fashion that the Ordinance's requirement that a property owner obtain a permit before removing a unit from the rental housing market establishes a "permanent physical occupation" by tenants, akin to the "permanent physical occupation" held to be a *per se* taking in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). From this premise, they conclude that the permit requirement is unconstitutional on its face, without the need to carry out any further facial inquiry or balancing.

Even the briefest reflection suggests fundamental problems with petitioners' approach. Petitioners seek to focus this Court's attention on what they perceive to be the Ordinance's requirement that they permit tenants to continue to reside in their units, urging that this establishes a "permanent physical occupation." But in fact petitioners are not aggrieved by those aspects of the Ordinance, such as the restriction on holding a unit vacant, or the restriction on demolition, which arguably could require continued tenant occupancy of units in some circumstances. *See* Ordinance, §1(b)(4)(ii), (v) (pp. A-60, 61). As petitioners concede, the Ordinance does *not* limit owner-occupancy of units in conventional apartment buildings such as theirs; it explicitly permits petitioners to evict tenants for the purpose of residing in units in the buildings they own. *See* Ordinance, §1(b)(4) (p. A-61).

Moreover, and even more fundamentally, petitioners' quarrel with the Ordinance in fact arises from a provision that is completely unrelated to tenant occupancy. Petitioners wish to sell their units as condominiums or cooperatives. Thus, the Ordinance provision by which they are aggrieved is Section

1(c ½), which prohibits the sale of an individual condominium unit without a permit.[12] This regulation of unit sales, however, has nothing whatever to do with protecting tenant occupancy; it applies to sales to tenants as well as sales to nonresidents.[13] *See* Ordinance, §1(c ½) (p. A-62).

In fact, the regulation on sales in Section 1(c ½) closely resembles a restriction on the subdivision of real property.[14] While restrictions on property subdivision can in some circumstances be so severe as to constitute takings, they simply cannot be facially invalid as "permanent physical occupations" under *Loretto*. Rather, they must be analyzed to determine if they amount to regulatory takings when applied to particular parcels. *See, e.g., Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 104 (1978).

The point is well illustrated by *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980). A property owner there claimed that the enactment of a zoning ordinance, which required that he obtain approval before developing his property, and limited that development to no more than five homes, was a facial taking. This Court rejected his claim, pointing out that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, . . . or denies an owner economically

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[12] As to Southview's cooperative units, the governing provision regulates "conversion to a cooperative," not owner-occupancy. *See* Ordinance, §1(b)(4)(iv).

The situation was different before the amendment of the Ordinance in 1981 to add the restriction on unit sales (and during the brief interval in 1989-1990 when the currently-governing provision was not in effect *(See* note 5, *supra))*. At that time, the governing provision with respect to condominium conversion regulated the occupancy of condominium units by their new owners after the units were sold, and thus arguably raised petitioners' issues. *See* Ordinance, §1(b)(4)(i) (p. A-60). But since 1981 that provision has effectively been superseded by the prior sale regulation. Ordinance, §1(c ½).

[13] Only tenants who have resided in their units since prior to the Ordinance's enactment in 1979 are exempt from the need to obtain permits in order to buy their units. *See* Ordinance §1(c ½) (p. A-62).

[14] Petitioners do not need a permit to sell their entire interest in a building. Ordinance §1(c ½) (p. A-62).

viable use of his land." *Id.* at 260. It went on to point out that "no precise rule" governed, and that resolution of the issue required "a weighing of private and public interests." *Id.* at 260-261. *See also Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979) (Court has "examined the 'taking' question by engaging in essentially ad hoc, factual inquiries"); *Penn Central Transp. Co.*, 438 U.S. at 124 (there is no "set formula" for takings analysis; decisions frequently turn on "the particular circumstances" of the case).

Such complex and fact-bound analyses cannot be carried out in the abstract setting of a facial takings claim such as this case presents. As the court of appeals correctly held, such a case is not ripe until a permit is sought.

3. Loretto *does not apply here in any event.*

There are further reasons why, despite petitioners' suggestion, *Loretto* cannot be the basis of any challenge to the Ordinance as facially unconstitutional. First of all, as discussed above, the Ordinance explicitly provides that if an owner of rent controlled housing himself wishes to occupy a unit in a building he owns, he may do so as a matter of right without obtaining any removal permit from the Board, and may evict his tenant to do so. This provision alone renders any *Loretto* analysis impossible.

In the *Loretto* case, Teleprompter, the intruding third party, could not be displaced from its occupation of Loretto's property even if Loretto herself wished to install cable television equipment in the same location. Teleprompter thus had the absolute right permanently to occupy the space, and Loretto was permanently barred. This is precisely what "permanent physical occupation" means. Petitioners' tenants in their conventional apartment buildings, by contrast, *must* vacate if petitioners wish to occupy their units. The Ordinance thus makes clear that petitioners' rights to occupy their property in such buildings are preserved and are superior to any rights of their tenants. There thus is no absolute right of "permanent physical occupation" in the tenants.

Moreover, even aside from that critical distinction, the *Loretto* decision itself explicitly cautions that it is not intended to upset established principles of landlord-tenant law:

> [W]e do not agree with appellees that application of the physical occupation rule will have dire consequences for the government's power to adjust landlord-tenant relationships. This Court has consistently affirmed that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails. *See, e.g.*, . . . *Bowles* v. *Willingham*, 321 U.S. 503 (1944) (rent control); *Home Building & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398 (1934) (mortgage moratorium); *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U.S. 242 (1922) (emergency housing law); *Block* v. *Hirsh*, 256 U.S. 135 (1921) (rent control).

Loretto, 458 U.S. at 439-440.

In making explicit that it was not interfering with the states' "broad power to regulate . . . the landlord-tenant relationship," the *Loretto* Court was recognizing the fact that that relationship always has been subject to special rules. In *Block* v. *Hirsh*, 256 U.S. 135 (1921), the first of the many cases in which this Court has upheld restrictions on eviction in the context of rent control, Justice Holmes wrote:

> The preference given to the tenant in possession is an almost necessary incident of the policy, and is traditional in English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail.

Block, 256 U.S. at 157-158. Thus, it is clear that provisions protecting tenants have long enjoyed special status and were not called into question by *Loretto*. (In this regard, it is significant that the *Loretto* decision itself specifically cites the decisions since *Block* in which this Court upheld eviction restrictions against constitutional challenge.)

Moreover, this Court repeatedly has declined to apply *Loretto* as petitioners would have it do. For example, in *Pennell*, 485 U.S. at 12, n.6, the Court pointed out that "some *amici*" had argued that "rent control is *per se* a taking." Citing the passage from *Loretto* quoted above, however, this Court concluded that "we see no need to reconsider the constitutionality of rent control *per se*." Moreover, this Court has demonstrated that it means just that by declining to review subsequent rent control cases. *See 640 Broadway Renaissance Co.* v. *Cuomo*, 111 S.Ct. 2054 (1991), *denying cert. to* 927 F.2d 593 (2d Cir.), *aff'g* 740 F. Supp. 1023 (S.D.N.Y. 1990); *Cohen* v. *Berger*, 111 S.Ct. 1586 (1991), *denying cert. to* 75 N.Y.2d 809, 551 N.E.2d 604, 552 N.Y.S.2d 111 (1990), *dismissing appeal from* 153 A.D.2d 920, 545 N.Y.S.2d 728 (1989). There simply is no reason for the Court to depart from that rule here.[15]

Finally, even were a *Loretto* analysis somehow appropriate, any finding of unconstitutionality herein is precluded by the fact that petitioners already are receiving all the compensation to which they would be constitutionally entitled for the occupation of their buildings in any event; they are guaranteed a "fair net operating income" in the form of rent from the occupying tenants. 1976 Mass. Acts, ch. 36, §7(a). This is in sharp contrast to the situation in *Loretto*, where the property owner was given only a one-time $1 payment. *See Loretto*, 458 U.S. at 423-424. For this reason alone, *Loretto* cannot govern and the Ordinance is constitutional on its face. *See Home Bldg. & Loan Ass'n* v. *Blaisdell*, 290 U.S. 398, 425 (1934) (upholding statute extending period for redemption of real

[15] Petitioners suggest that *Hall* v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988), conflicts with the decision herein, and that the conflict justifies Court intervention. There is no conflict. As petitioners themselves concede, Petition, p. 21, the Ninth Circuit in *Hall* viewed as "crucial" to its finding that a constitutional claim was stated, *id.* at 1279, the fact that an existing tenant could sell the right to indefinitely occupy his site, and indeed that tenants were doing so and receiving large sums. The Ninth Circuit correctly viewed this provision as distinguishing the case before it from the conventional rent control situation. It meant that the landowner retained no control whatever over the property involved. The Cambridge Ordinance contains no such provision; hence, *Hall* in no way conflicts with the decision herein.

property sold after foreclosure, since "while the mortgagor remains in possession, he must pay the rental value").

D. *The Due Process Issues Should Not Be Reached On The Merits, And In Any Event, Are Not Significant.*

Petitioners also suggest that this Court should take this case to review the court of appeals decision that the Ordinance does not violate their due process rights.

Both lower courts found this issue easy to resolve on the merits. The district court dismissed petitioners' due process claims in a footnote, *Gilbert*, 745 F.Supp. at 51, n.7 (p. A-46), and the court of appeals affirmed in a single paragraph. *Gilbert*, 932 F.2d at 65-66 (pp. A-26 to 27). That court, citing *Nebbia* v. *New York*, 291 U.S. 502, 537 (1934), found that

> an ordinance controlling the removal of rental units is not "arbitrary, discriminatory, or demonstrably irrelevant" to its stated and presumptively legitimate goal of assuring an adequate supply of rental housing . . . but instead "represents a rational attempt to accommodate the conflicting interests of protecting tenants . . . while at the same time ensuring that landlords are guaranteed a fair return on their investment."

Gilbert, 932 F.2d at 65-66 (pp. A-26 to 27), quoting *Pennell*, 485 U.S. at 11. Petitioners' efforts to suggest that the court of appeals somehow erred in this analysis need not detain the Court.

First of all, the issue is not even open for review in this Court. In addition to its ruling on the merits, the court of appeals also held, *Gilbert*, 932 F.2d at 66, n.20 (p. A-28) that the due process claims were not ripe because there had been no permit applications, and hence no concrete application of the Ordinance to petitioners' property. That procedural ruling as to the due process claim is not challenged by petitioners.

Moreover, upon reaching the merits the court of appeals applied the conventional and correct due process analysis, as

illustrated recently in the rent control context by *Pennell*, and its decision is clearly correct. Petitioners' heavy reliance on *Chas. Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 (1923), only demonstrates the emptiness of their argument. That case held that it was beyond the power of a state to fix the minimum wages a meatpacking company was required to pay, on the ground that such regulation interfered with the employer's, and the employees', freedom of contract. Neither that holding, nor the dictum quoted by petitioners from *Munn* v. *Illinois*, 94 U.S. 113, 126 (1877), with respect to compelling a business to continue in operation, can be considered governing due process law. *See, e.g., Nebbia*, 291 U.S. at 502.

Moreover, even were it the law, *Chas. Wolff* would not be relevant. As pointed out above, the provision of the Ordinance that affects petitioners is the one that forbids their sale of individual units. Since they may sell the building as a whole, however, Ordinance §1(c ½) (p. A-62), it is clear that the restriction on unit sales does not compel them to remain in any business against their will.[16]

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[16] To the extent that any issue of compelling petitioners to remain in business could be raised by the Ordinance, it would be by Section §1(b)(4)(v), which regulates the holding vacant of units. Petitioners are not aggrieved by that provision, however. They do not assert that they wish to hold units vacant, and they would not be assisted in their program to convert to condominiums were they permitted to do so.

Conclusion

For the foregoing reasons, the petition for writ of certiorari does not present any question warranting the Court's review, and the Court should deny the petition.

Respectfully submitted,

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